BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD J. DOLLAR Claimant VS. **WILDWOOD OUTDOOR EDUCATION CENTER** Respondent AND **HARTFORD ACCIDENT & INDEMNITY** Insurance Carrier	)	Docket No. 1,009,908

ORDER

Respondent and its insurance carrier requested review of the August 19, 2005 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on November 29, 2005.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Heather Nye, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's functional impairment was related to his work-related injury and that he had between 25 and 35 percent permanent partial impairment to the body as a whole. The ALJ admitted there was evidence that some of the disability was preexisting but found that respondent had not established what amount actually preexisted the work injury and so averaged the 25 percent and 35 percent ratings, awarding claimant a 30 percent permanent partial general body disability. The ALJ

also stated he used respondent's earning figures and found claimant's average weekly wage to be $413.46 with a benefit rate of $275.65 per week.

The respondent and its insurance carrier (respondent) contend the ALJ erred in failing to apply claimant's preexisting disability to claimant's functional rating. Respondent states that Dr. Robert Takacs found claimant's total impairment to be 35 percent but specifically found claimant had 14 percent permanent partial impairment to the body as a whole from this injury over and above his preexisting impairment of 21 percent. Dr. Edward Prostic found claimant had 15 percent permanent partial impairment to the body as a whole over and above his preexisting impairment. Respondent stated that no physician assessed a 25 percent permanent partial impairment rating on claimant.[1] Respondent argues that claimant's impairment of function for this accident is 14.5 percent, which is an average of the opinions given by the two physicians.

Claimant argues the ALJ erred in failing to award claimant work disability. Claimant contends he made a so far unsuccessful but good faith effort to return to the open labor market and is, therefore, entitled to a 100 percent wage loss. Claimant also notes that Dr. Prostic opined that claimant had a 62 percent task loss. Combining the task loss and the wage loss would calculate to a work disability of 81 percent. Claimant also incorporates by reference his submission letter filed October 31, 2005. In that submission letter, claimant argues his average weekly wage was $441.92, which was computed using an annual salary of $22,500 plus $40 per month "spending money." Claimant claimed respondent agreed to provide fringe benefit information at the Regular Hearing but failed to do so. Nevertheless, claimant requests that an amount for those fringe benefits be added to claimant's base wage of $441.92 weekly.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant testified that he started working for respondent on February 20, 2001, as a maintenance director. Respondent is an approximately 237-acre outdoor educational center used by private schools in the Kansas City metropolitan area for adventure-type courses. Claimant's duties were to maintain the grounds and buildings of the facility, including mowing and weed trimming, painting, keeping water drainage ditches open, picking up and disposing of trash and cutting up and removing downed timber.

On May 20, 2002, claimant was digging a ditch and stepped down to clear the ditch of debris. He was prying and pushing on an embedded rock when he felt an excruciating,

[1] The ALJ could have arrived at the 25 percent figure by combining Dr. Prostic's 15 percent impairment rating for the new injury with his opinion that the preexisting impairment may have been at least 10 percent. Prostic Depo. (Jan. 17, 2005) at 47.

sharp pain shoot through his left leg and lower back. Claimant reported the injury to his supervisor, Jose Cornejo, and respondent provided him with medical treatment for his injury. He was initially seen by his personal physician, who prescribed pain medication and muscle relaxants and ordered an MRI. Respondent's insurance carrier referred claimant to Dr. Jeffrey MacMillan, who reviewed the results of the MRI and recommended pain medication and physical therapy. Claimant's pain continued to get worse, and Dr. MacMillan ordered a diskogram. Dr. MacMillan then advised claimant that he needed surgery. Respondent's insurance carrier then sent claimant to Dr. Robert Takacs. Dr. Takacs agreed with Dr. MacMillan that claimant needed surgery, and claimant underwent a fusion of his spine at L4-5 on January 23, 2003. After surgery, claimant underwent physical therapy and was released to office work only on February 18, 2003.

Claimant testified he returned to work for respondent after being released to light duty by Dr. Takacs and worked approximately a month to six weeks. He testified that when he returned to respondent, they did not offer him any light-duty work but that he was given heavy job tasks that included pushing 100-pound loads in a wheelbarrow, dragging brush, vacuuming a very large room, washing windows and cutting and stacking wood. He testified that he had a lot of pain and took so much pain medicine that he was "about half spaced-out most of the day."[2] He voiced concerns to respondent about being able to perform his job but needed the paycheck so continued to work. Claimant testified he complained to Dr. Takacs that respondent was making him do regular duty work rather than light duty, and Dr. Takacs gave him another release explaining light duty/sedentary-only work. Claimant shared this job description with Mr. Cornejo. He testified that Mr. Cornejo told him that his job "needs to be done" and that if claimant could not do it, "I guess you need to leave."[3] At that point, claimant began to look for other employment. Claimant testified that if he had been given light-duty work, he would have continued to work for respondent.

Claimant faxed a letter to respondent dated April 7, 2003, advising that he was giving notice that he was leaving immediately for Arkansas. The letter stated claimant was to begin work in Arkansas on April 9, 2003. Claimant intended to work in Eureka Springs, Arkansas, a heavily-populated tourist area with numerous job openings. However, during the move to Arkansas, he had a massive heart attack. He testified he was released by his doctors after the heart attack in May or June 2003, and his heart condition is not keeping him from working. However, he stated that by the time he had recovered from his heart attack, his job prospect in Arkansas was no longer available. At the time of the hearing, claimant was not working and was receiving social security benefits of $806 a month.

Mr. Cornejo testified that on February 18, 2003, he received a work restriction concerning claimant from Dr. Takacs which stated claimant could do office work only. Claimant was told respondent was unable to accommodate this restriction. Mr. Cornejo

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[2]R.H. Trans. (Dec. 14, 2004) at 26.

[3]*Id.* at 25.

did not think claimant worked for respondent after getting Dr. Takacs' restrictions in February 2003 and thinks April 3, 2003, was the first time claimant worked after his surgery. Mr. Cornejo testified that a memo dated March 27, 2003, indicating he met with claimant was misdated, and the meeting with claimant was actually held on April 4, 2003. On April 1, 2003, respondent received another restriction from Dr. Takacs regarding claimant which indicated claimant was to do no frequent bending, no lifting greater than 50 pounds, light duty and half days. Mr. Cornejo testified he advised claimant that respondent could accommodate those restrictions, and claimant returned to work on April 3, 2003. Mr. Cornejo admitted that claimant told him on April 3 that he thought his job duties were causing him further injury.

Mr. Cornejo testified that claimant was not asked to haul and carry heavy screen doors, to fill holes with gravel, to cut and stack wood or to haul trash. Claimant was asked to vacuum and wash windows, as Mr. Cornejo thought those duties would be within his job restrictions. Mr. Cornejo testified claimant worked four hours on April 3 and four hours on April 4, and that was the last time he worked for respondent. On Friday, April 4, 2003, claimant met with Mr. Cornejo. Mr. Cornejo testified that claimant told him he was looking for other employment and wanted to work at a job where he could be more of a supervisor. Mr. Cornejo denied telling claimant that if he could not handle the work he needed to leave. Mr. Cornejo testified he told claimant that respondent would work with him to accommodate his restrictions and it was respondent's intention to maintain claimant as a full-time employee.

Dr. Robert Takacs is a board certified orthopedic surgeon. He saw claimant at the request of respondent on October 21, 2002, for a second opinion. Claimant told Dr. Takacs that he had a previous back surgery, a spinal fusion at L4-5, in Oklahoma in 1994, and in 1996 had the spinal instrumentation removed from his back. Claimant reported to Dr. Takacs that he had done well after those surgeries until he was injured in May 2002. After examining claimant, Dr. Takacs concurred with Dr. MacMillan's recommendation that claimant proceed with surgery.

Dr. Takacs took over claimant's care in November 2002, and surgery was performed in January 2003. Dr. Takacs described the surgery as an anterior interbody fusion at the L4-5 level. This surgery was at the same level as claimant's previous surgeries, but his previous fusion was a posterior fusion rather than an anterior fusion. For a typical one-level fusion, Dr. Takacs' usual restrictions are no lifting more than 50 pounds and no frequent bending or twisting. In claimant's case, because of the addition of the cardiac problem, Dr. Takacs limited claimant to a sedentary job. Dr. Takacs would typically have sent claimant to have a functional capacity evaluation (FCE) but did not feel claimant could tolerate it because of his heart problem. Dr. Takacs would not give an opinion as to what permanent restrictions he would have given claimant if not for the heart problem because an FCE was not done.

Dr. Takacs rated claimant has having a 35 percent whole body impairment. His understanding was that claimant was previously rated at 21 percent to the body as a

whole, so Dr. Takacs opined that claimant had an additional 14 percent impairment as a result of the current injury. Dr. Takacs testified he got the 21 percent figure from claimant and had not seen any medical reports concerning claimant's previous back injury. Dr. Takacs testified he used the Third Edition of the AMA *Guides* in computing claimant's percentage of impairment but later, when asked whether his rating of claimant's current impairment was based on the Fourth Edition of the AMA *Guides*, Dr. Takacs said it was.

Dr. Takacs testified that claimant had not been released as being at maximum medical improvement (MMI) in April 2003, and that normally a patient would not reach MMI for five to six months after surgery. Dr. Takacs released claimant as being at MMI on March 1, 2004.

Dr. Edward Prostic, a board certified orthopedic surgeon, saw claimant at the request of claimant's attorney on May 5, 2003. Claimant gave him a history of injuring his low back on May 20, 2002, while digging.

At the time of this examination, claimant was still complaining of intermittent pain at the center of his low back at waist level, with occasional radiation down the left leg toward the top of the foot and heel. His condition worsened with prolonged sitting, standing or walking, as well as with attempted bending, squatting, twisting, lifting, pushing and pulling. After examination, Dr. Prostic diagnosed claimant with injury to L4-5, for which he had undergone repeat stabilization, and found claimant was suffering from degenerative changes at L5-S1 with mild radicular symptoms. Dr. Prostic opined that the injury was caused or contributed to by claimant's work-related accident on May 20, 2002. Dr. Prostic determined that claimant had a 15 percent permanent partial impairment of the body as a whole, based on the AMA *Guides*. He testified this impairment is over and above any preexisting impairment.

On cross-examination, Dr. Prostic was asked whether claimant was at MMI when he saw him, as it was only three and one/half months post-surgery. Dr. Prostic was unable to state that claimant was at MMI at the time of his examination but considered claimant's condition to be "stable, and therefore, rateable."[4] He deferred to the treating physician, Dr. Takacs, for restrictions. At the time, the restrictions Dr. Takacs had placed on claimant were 50 pounds lifting and no frequent bending. However, Dr. Prostic was unaware what restrictions Dr. Takacs had recommended and was likewise not aware, until his deposition, that Dr. Takacs subsequently changed his restrictions for claimant. Dr. Prostic, during his deposition, said he would change his restrictions to the following:

> What I would recommend, based upon his examination, is that he not be lifting weights greater than 30 pounds occasionally, or ten to 15 pounds frequently, with significant lifting in the optimal position for his low back. He should also avoid

[4]Prostic Depo. (Jan. 17, 2005) at 16.

> frequent bending or twisting at the waist, forceful pushing or pulling, use of vibrating equipment, or captive positioning.[5]

He said these restrictions were just for claimant's back and were given without regard to claimant's heart condition.

Dr. Prostic examined claimant a second time on January 19, 2005, two days after his first deposition. At that time, Dr. Prostic took an up-dated medical history from claimant. He noted that in a report dated August 3, 2004, Dr. Takacs had suggested claimant perform only light duty work, meaning sedentary work. Dr. Takacs believed that with claimant's fusion and heart problems, he was not able to bend, lift, twist or strain.

Claimant told Dr. Prostic that his symptoms were similar to those previously reported in May 2003, but that overall his pain was worsening. He complained of frequent numbness of his left foot with pain throughout the leg. Dr. Prostic testified that the results of his re-examination of claimant were consistent with his complaints of pain from the work-related injury while working for respondent. Dr. Prostic again placed physical restrictions on claimant of no lifting greater than 30 pounds occasionally or 10 pounds frequently and avoiding frequent bending or twisting at the waist, forceful pushing or pulling, use of vibrating equipment or captive positioning.

Dr. Prostic's 15 percent permanent partial impairment rating over and above any preexisting functional impairment did not change. He testified his rating was based on the AMA *Guides* using the range of motion model. He gave claimant 12 percent of the body for lumbar arthrodesis and 3 percent for his additional loss of forward flexion and lateral bend to each side.

Dr. Prostic also reviewed Karen Terrill's task list in light of his supplemental examination of claimant and opined that claimant was unable to complete 29 of the 47 tasks for a task loss of 62 percent.

Records from claimant's Oklahoma workers compensation case were admitted into evidence. In that case, claimant was given a 33 percent permanent partial impairment rating to the body as a whole based on the Third Edition Revised and the Fourth Edition of the AMA *Guides*. Dr. Prostic admitted that the records in the Oklahoma case indicate claimant was complaining of numbness in his left leg into his foot. Dr. Prostic stated that although claimant's range of motion may have varied, he believed that claimant's leg symptoms would be consistent with the complaints he had at the time he was rated in 1997 for his Oklahoma workers compensation claim. Dr. Prostic recorded less motion than that recorded in 1997. The change in claimant's range of motion would indicate that claimant had a worsening of his condition after 1997.

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[5] Prostic Depo. at 11-12.

Dr. Prostic stated that a good portion of the 33 percent impairment rating from claimant's Oklahoma workers compensation case was for a purported lumbosacral plexus injury, of which Dr. Prostic found no evidence. This, plus the fact that the rating was given by a family practitioner rather than an orthopedic surgeon, made Dr. Prostic suspicious of the rating. Dr. Prostic stated that his belief was that under Kansas law, for someone to get that high a rating on a functional basis, the patient would need to be partially paralyzed.

Karen Terrill is a qualified rehabilitation professional. She visited with claimant by telephone on August 9, 2004, and August 23, 2004, and prepared a list of his job tasks for the 15-year period before his May 20, 2002 injury. The list she and claimant compiled contained 47 nonduplicative tasks. She did not communicate with any of claimant's employers.

Ms. Terrill testified that taking into account claimant's restrictions, education, training and background, claimant could realistically earn a salary of $6.50 to $7.00 per hour. Dr. Takacs' half-day restriction would indicate a greater loss of wages. Even if she took away the factor of half days and sedentary work only, she still thought claimant could only make about $7.00 per hour.

Ms. Terrill stated that claimant attempted to run his own business from April 1, 2003 to April 18, 2003, but claimant indicated that his back pain level was too high. After his heart attack on April 18, 2003, he discontinued that attempt at employment. Claimant did not indicate that he made any money on this venture. Claimant told Ms. Terrill that he had applied at about 200 to 300 places without being able to find employment. Claimant told her that he had applied for all types of work, including hotels, McDonald's, restaurants, Wal-Mart, and anything from a cashier to a desk clerk. Ms. Terrill did not do a job market survey on behalf of claimant.

Claimant also raised an issue of his average weekly wage. Claimant entered into evidence a letter he received from respondent on February 20, 2001, offering him the position of maintenance director. In the letter, respondent advised that claimant's salary would be $22,500 annually with a $40 per month nontaxable allowance that claimant was free to use as he wished.[6] The letter also indicated that respondent would pay claimant's health insurance. Claimant testified that at the beginning of claimant's fiscal year, he received a cost-of-living raise, which he thought was six percent.

Mr. Cornejo testified that regardless of the letter to claimant offering him a position with respondent for $22,500 annually, claimant was actually an hourly employee being paid $9 per hour. In addition, claimant was given a $40 per month allowance check. However, Mr. Cornejo also indicated that claimant was paid an annual salary of $21,500 and that the discrepancy between this amount and the letter offering the job to claimant at a salary of $22,500 was a typographical error. Respondent entered into evidence a wage statement

[6]R.H. Trans. (Dec. 14, 2004), Cl. Ex. 2.

prepared by Mr. Cornejo showing that claimant's average weekly wage for the 26 weeks prior to his May 20, 2002, injury was $413.46[7]. Mr. Cornejo indicated that on the wage statement submitted by respondent, all he did was divide $21,500 by 52 to come up with an average weekly wage of $413.92. He did not actually go through claimant's wage records to get this information, and the wage statement did not reflect the $40 per month allowance received by claimant. Mr. Cornejo also stated that claimant may have received a two or two and one/half percent raise on his anniversary date, which would have been in February 2002. At the regular hearing held February 17, 2005, the ALJ asked Mr. Cornejo if respondent could get a computer print-out of claimant's actual wages. Mr. Cornejo indicated that he could get this information. However, there is no indication that these records were provided to either claimant or the ALJ.

Mr. Cornejo testified that respondent paid for claimant's health insurance. This payment varied from year to year, and when claimant last worked for respondent, the amount was $166 per month.

The ALJ calculated claimant's Award using the respondent's earning figure of $413.92 per week. The ALJ did not utilize the $40 monthly allowance claimant was paid, stating that "there is no showing of what the actual expenses intended to be reimbursed were."[8] There was no explanation for why a value for the health insurance benefit was not added to the average weekly wage.

The Board finds the February 20, 2001, letter from respondent to be more credible than the wage statement prepared by Mr. Cornejo. Claimant's base wage is $432.69 ($22,500 ÷ 52), plus $10.82 for the 2.5 percent cost of living raise, plus the weekly equivalent of the $40 monthly expense payment, $9.23 ($40 x 12 ÷ 52), for an average weekly wage of $452.74 and a compensation rate of $301.84 through the date claimant last worked for respondent. After April 7, 2003, the date claimant resigned from his employment with respondent, the cost of the health insurance, $38.31 ($166 x 12 ÷ 52) is added to his average weekly wage for a total gross average weekly wage of $491.05 and a compensation rate of $327.38.

The Kansas appellate courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[9] Additionally, permanent partial general disability benefits are limited

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[7]R.H. Trans. (Dec. 14, 2004), Cl. Ex. 7.

[8]ALJ Award (Aug. 19, 2005) at 7.

[9]*See, e.g., Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[10]

In *Foulk*[11], the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability by refusing an accommodated job that paid a comparable wage. Employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[12] In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine[13] or not within the worker's medical restrictions.[14]

The permanent partial general bodily disability, or what is also known as "work disability" is defined at K.S.A. 44-510e(a) and provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A.44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** (Emphasis added.)

It is well settled that an injured employee must make a good faith effort to return to work within his or her capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[15] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[16] In order to determine if the employee is still capable of earning nearly the same

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[10] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1988).

[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Niesz v. Bill's Dollar Stores*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[13] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[14] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[15] *Oliver v. Boeing Co.,* 26 Kan. App. 2d 74, 76-77, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[16] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

wage, the factfinder must first determine if the employee made a good faith effort to find appropriate employment.[17]

Following his release to return to work, respondent attempted to accommodate claimant's restrictions. Claimant voluntarily quit his job with respondent in order to pursue another job opportunity that claimant believed would be less physically demanding. Unfortunately, before commencing that new employment, claimant suffered a heart attack and was temporarily disabled by that condition. As a result, his new job opportunity was lost. It is understandable that claimant would seek other employment. Regardless of accommodations, claimant's job with respondent would always be physically demanding. Nevertheless, respondent demonstrated a willingness to accommodate claimant's restrictions from his work-related injury. It appears that respondent could not accommodate claimant's additional restrictions given for the combination of his back and his heart conditions.

Respondent demonstrated its willingness to return claimant to work and accommodate his restrictions that resulted from the work injury. The record supports a finding that claimant would have been able to return to full-time accommodated work with respondent at the same wage but for his quitting and subsequent heart attack. Accordingly, the Board concludes that claimant's permanent partial disability should be limited to his percentage of functional impairment from the work-related injury, which the Board finds is 14.5 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 19, 2005, is modified as follows:

The claimant is entitled to 43.5 weeks of temporary total disability compensation at the rate of $301.84 per week or $13,130.04 followed by 2.21 weeks of permanent partial disability compensation at the rate of $301.84 per week or $667.07 followed by 53.83 weeks of permanent partial disability compensation at the rate of $327.38 per week or $17,622.87 for a 14.5 percent functional disability, making a total award of $31,419.98.

As of December 8, 2005 there would be due and owing to the claimant 43.5 weeks of temporary total disability compensation at the rate of $301.84 per week in the sum of $13,130.04 plus 2.21 weeks of permanent partial disability compensation at the rate of $301.84 per week in the sum of $667.07 plus 53.83 weeks of permanent partial disability compensation at the rate of $327.38 per week in the sum of $17,622.87 for a total due and owing of $31,419.98, which is ordered paid in one lump sum less amounts previously paid.

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[17] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, Syl. ¶ 1, 9 P.3d 591 (2000).

The Board adopts the other orders of the ALJ to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Heather Nye, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director